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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRANDON DONTE MEEKS, Defendant and Appellant.	2d Crim. No. B208804 (Super. Ct. No. TA084532) (Los Angeles County)

Brandon Meeks appeals the judgment following his conviction for first degree murder (Pen. Code, §§ 187/189),[1] and two counts of attempted second degree robbery (§§ 664/211). Meeks contends that the admission of incriminating statements by a codefendant and a third accomplice violated his constitutional rights to confrontation and cross-examination under *People v. Aranda* (1965) 63 Cal.2d 518, 528-531 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123, 135-137 (*Bruton*), and also under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Meeks also claims prosecutorial misconduct and insufficient evidence to support one of the attempted robbery convictions. We will correct a sentencing error. Otherwise, we affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

Oluwaseyi Awoleye and 18-year-old Johnny King were working in a cellular phone store owned by Awoleye. Jaliel Neely, Brandon Meeks, and Michael Walter entered the store and yelled, "Get down, get down." Meeks walked up to Awoleye and pointed a gun at his head. Neely, also armed with a gun, stood next to King. Standing between Neely and Meeks, Walter stated: "You know what this is."

A gun was fired and Johnny King fell to the ground fatally wounded. The three assailants ran out of the store. Walter appeared to take some cell phone accessories from a display case before he left.

Awoleye called 911 and, when sheriff's deputies arrived, described the three men. He also told deputies that he recognized Walter as a former customer. The next day, Awoleye made a photographic identification of Neely, Meeks, and Walter as the assailants. The three men were located by police and arrested. Neely was 17 years old, Meeks was 18 and Walter was 15.

After his arrest, Neely made a statement to sheriff's deputies. In the version of the statement admitted into evidence, Neely admitted he went to Awoleye's store with Walter and Meeks with the intent to rob the store. Neely claimed he was the "look-out" and did not have a gun. He stated that Walter and Meeks were carrying guns and that Walter shot Johnny King.

Deputies also surreptitiously recorded a conversation between Neely and another inmate in a courthouse holding cell during which Neely implicated Meeks in the offenses. Neely stated that a man he referred to as "Big Dog" participated in the offenses and was holding Awoleye or King "down to the ground." The name "Big Dog" was linked to Meeks through photographs of Meeks with the words "Big Dog" written on them and a photograph of Meeks with Neely which had been discovered in a search of Meeks' residence. Sheriff's deputies also found clothing that resembled the clothing the assailants were wearing at the time of the murder.

Meeks was charged with first degree murder and the attempted robbery of King and Awoleye. The information alleged the special circumstance of murder during

the commission of robbery (§ 190.2, subd. (a)(17)), as well as firearm enhancements (§ 12022.53, subds. (b), (c), (d) & (e)(1)), a gang enhancement (§ 186.22, subd. (b)(1)(A)), and a prior offense enhancement (§ 667.5). A jury convicted Meeks of the crimes but found the special circumstance allegation not true. In return for dismissal of the gang and prior offense enhancements, Meeks admitted that a principal personally used a firearm in the murder and attempted robbery of King. (§ 12022.53, subd. (b).)

Meeks was sentenced to prison for a term of 36 years to life. The sentence consisted of 25 years to life for first degree murder, a consecutive term of 10 years for a gang enhancement,[2] and concurrent terms of three years for each attempted robbery.

DISCUSSION

No Error in Admitting Redacted Confession of Codefendant

Meeks contends that admission of the confession made by codefendant Neely to sheriff deputies violated his constitutional right of confrontation under both the *Aranda/Bruton* rule and *Crawford*. He argues that, although redacted, the confession clearly, if indirectly, identified Meeks as the third accomplice who committed the offenses with Neely and Walter. We disagree. We conclude that Meeks forfeited this claim by failing to object in the trial court and further conclude that, on the merits, any error was harmless beyond a reasonable doubt.

Admission of an out-of-court statement by a non-testifying defendant that incriminates a codefendant violates the codefendant's rights of confrontation and cross-examination. (*Aranda*, at pp. 528-531; *Bruton*, at pp. 135-137.) Such a statement is admissible if redacted so that it is not incriminating "on its face." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) When a statement is redacted to replace a reference to a codefendant with a reference to an unidentified person, the statement is admissible even if the jury could infer *from other evidence* that the person is the codefendant. (*Id*. at p. 211; *Aranda*, at pp. 530-531.) But, such redaction is insufficient if the jury could infer

[2] As we will discuss, the trial court erroneously sentenced Meeks on the gang enhancement rather than the firearm enhancement.

that the unidentified person is the codefendant without considering other evidence. (*Gray v. Maryland* (1998) 523 U.S. 185, 196.)

At a hearing to determine whether the case would be tried before one or two juries, the prosecution proposed admission of a version of Neely's confession that had been redacted to eliminate Meeks' name. Defense counsel argued that the redaction was insufficient because the jury could identify Meeks as a participant in the offenses based on numerous references to a third accomplice that remained in the redacted statement. In response, the trial court made further redactions deleting several references to a third accomplice. The court asked defense counsel whether there was any objection to its further redactions, and counsel did not object. The failure of Meeks to object forfeited his *Aranda/Bruton* claim. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186 [failure to object on confrontation clause grounds waives claim].)

Meeks argues that there was no forfeiture because an objection would have been futile. Meeks notes that, although the trial court asked counsel whether its redactions were acceptable, the court also stated that it believed its deletions "would be good enough for one jury" even if its deletions were not agreeable to defense counsel. Meeks claims that this statement announced that the court would overrule any objection. We disagree. The trial court delayed its ruling until the following day to provide defense counsel with a further opportunity to review and respond to the court's redactions. The record does not indicate an unwillingness of the court to consider further changes.

Meeks also argues that admission of Neely's confession violated his right to confrontation under *Crawford*. *Crawford* holds that a defendant's confrontation rights are violated by admission of an out-of-court "testimonial" statement incriminating the defendant unless the defendant has had an opportunity to cross-examine the witness. (*Crawford,* at pp. 68-69; *People v. Geier* (2007) 41 Cal.4th 555, 597.) The same failure to object in the trial court forfeited any claim arising under *Crawford*. (*People v. Alvarez, supra,* 14 Cal.4th at p. 186; *People v. Neely* (2009) 176 Cal.App.4th 787, 795.)

In his reply brief, Meeks argues that trial counsel's failure to object constituted ineffective assistance of counsel. We disagree. To establish ineffective

assistance, a defendant must show counsel's conduct was both deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Mayfield* (1997) 14 Cal.4th 668, 783-784; *In re Harris* (1993) 5 Cal.4th 813, 832-833.) As we shall discuss, Neely's statement was not adequately redacted but any error was harmless and, therefore, not prejudicial. In addition, defense counsel reasonably could have concluded that the redactions were sufficient. Tactical choices made after investigation of the law and facts are "virtually unchallengeable" on appeal. (See *In re Cudjo* (1999) 20 Cal.4th 673, 692.)

On the merits, respondent concedes that the version of Neely's confession presented to the jury was not adequately redacted and violated *Aranda/Bruton*. In its original form, the confession directly implicated Meeks and Walter by name. The redacted version deleted all direct references to Meeks by name and many references to the offenses having been committed by three persons. But, the redacted version referred to another person entering the cell phone store with Walter and Neely, and stated that Walter and an unnamed person displayed guns and told Awoleye and King to get on the floor. The jury could have made the inference that the unidentified person was Meeks on the basis of statements included in Neely's confession itself.

Similarly, admission of Neely's confession also violated *Crawford*. Neely's confession was an out-of-court statement that incriminated Meeks, and Meeks had no opportunity to cross-examine Neely.

We conclude, however, that the error was harmless. The record shows, beyond a reasonable doubt, that any *Aranda-Bruton* or *Crawford* errors were insignificant and nonprejudicial in light of the evidence as a whole. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Harrison* (2005) 35 Cal.4th 208, 239; *People v. Anderson* (1987) 43 Cal.3d 1104, 1128-1129.) The evidence against Meeks was strong and unchallenged. Awoleye positively and specifically identified Meeks as one of the assailants, and the defense did not undermine this identification in any manner. Also, there was substantial other evidence of Meeks' participation in the offenses. Neely told a fellow inmate in a courthouse holding cell that "B-Dog" was an accomplice, and other

evidence including a photograph identified " B-Dog" as Meeks. Meeks did not challenge admission of Neely's jailhouse statement or the admission of the photographs. Also, sheriff's deputies found clothing in Meeks' residence that resembled the clothing worn by the assailants.

No Error in Admitting Evidence that Walter Confessed

Meeks contends the trial court erred by admitting evidence that accomplice Walter confessed to participating in the offenses. He argues that the evidence was prejudicial hearsay and inadmissible under *Crawford*. Meeks forfeited his claim by failing to object and, on the merits, any error was harmless beyond a reasonable doubt.

Sheriff's Deputy Traci Gonzales testified that, after Walter had been arrested, he confessed to her that he had been a participant in the offenses. No portion of the confession itself was admitted into evidence. Because Meeks did not object to admission of the testimony on any ground, he has forfeited his claim on appeal. (*People v. Hinton* (2006) 37 Cal.4th 839, 893, fn. 19 [failure to make Evid. Code, § 352 objection waives claim]; *People v. Alvarez, supra*, 14 Cal.4th at p. 186 [failure to object on confrontation clause grounds waives claim].)

We consider the issue on its merits because Meeks claims his counsel's failure to object constituted ineffective assistance. We conclude that there was no ineffective assistance of counsel. Also, any deficient performance was harmless, and any evidentiary error was harmless beyond a reasonable doubt.

The general rule is that evidence regarding the guilty plea or conviction of a co-participant in a crime is not admissible to prove guilt of a defendant. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1322; *People v. Leonard* (1983) 34 Cal.3d 183, 188-189.) The rationale for the rule is that a guilty plea or conviction of one participant is irrelevant to whether another person was correctly identified as a co-participant, and invites the inference of guilt by association. (*Ibid.*) We will assume for purposes of argument that evidence of a confession by a co-participant may have the same effect as evidence of a guilty plea or conviction.

In addition and as previously stated, an out-of-court testimonial statement offered against a defendant is inadmissible without a prior opportunity for cross-examination of the witness. (*Crawford,* at pp. 53-54.) A statement elicited from an arrestee during a police interrogation is testimonial. (*Id.* at pp. 68-69.) Although none of Walter's actual statements were admitted, *Crawford* issues cannot be circumvented by the admission of evidence referring to and disclosing a testimonial statement. The Gonzales testimony was offered as a substitute for Walter's own words and for the truth of the general import of the confession.

Nevertheless, the conclusion that the testimony was inadmissible does not show ineffective assistance by counsel. The record supports the conclusion that defense counsel may have had a valid tactical reason for not objecting to the testimony. (See *In re Cudjo, supra,* 20 Cal.4th at p. 692.) Trial counsel reasonably could have believed that evidence of Walter's confession might have been beneficial to Meeks because it identified another person who could be blamed for the actual shooting.

Even if trial counsel's performance was deficient and the evidence was inadmissible, any error was harmless. As to deficient performance by counsel, there is no reasonable probability that, but for counsel's error, the verdict would have been different. (*People v. Mayfield, supra,* 14 Cal.4th at pp. 783-784; *In re Harris, supra,* 5 Cal.4th at pp. 832-833.) As to any *Crawford* error, the record shows that the error did not contribute to the verdict beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at pp. 24, 26; *People v. Harrison, supra,* 35 Cal.4th at p. 239.) As previously stated, Awoleye identified Meeks, Neely's statement to a fellow inmate in the courthouse holding cell identified "B-Dog" as an accomplice, and other evidence identified " B-Dog" as Meeks. Also, the evidence concerned Walter's participation in the offenses and other evidence of Walter's involvement in the offenses was overwhelming, and nothing in the testimony regarding Walter's confession incriminated Meeks.

No Error in Admitting Evidence of "B-Dog" Nickname

Meeks contends that the trial court erred by admitting testimony by Deputy Gonzales that, during her investigation, Walter told her that Meeks was known as "B-

Dog." Meeks argues that the testimony was hearsay and its admission constituted *Crawford* error. Meeks forfeited his claim by failing to object and, on the merits, any error was harmless beyond a reasonable doubt.

Meeks forfeited his claim by failing to object to admission of the testimony in the trial court. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Alvarez, supra,* 14 Cal.4th at p. 186.) We disagree with Meeks' argument that the issue was preserved for appeal by his objection to the "B-Dog" evidence during a hearing on a motion to bifurcate trial of the gang allegation. In that hearing, the prosecutor argued that Meeks used "B-Dog" as a gang moniker. Meeks responded that no evidence supported the prosecutor's argument. Meeks did not object to admission of evidence on *Crawford*, hearsay or any other ground. He merely claimed the evidence did not exist.

Again, we consider the merits of the issue based on Meeks' ineffective assistance of counsel claim. Meeks argues that the Gonzales testimony is hearsay because it was offered for the truth of Walter's statement that Meeks was known as "B-Dog." Respondent concedes this point. Meeks also argues that the testimony constituted the recital of an incriminating "testimonial" statement by Walter during a police interrogation. Although respondent argues to the contrary, the record supports Meeks and, absent evidence to the contrary, we conclude that the statement by Walter was "testimonial." (See Evid. Code, § 403, subd. (a).)

Nevertheless, any error in admitting the evidence was harmless both under the California and federal standards. There is ample evidence that "B-Dog" was the nickname of Meeks apart from Walter's statement to Gonzales. Photographs of Meeks identified as "B-Dog" were found in his residence, and Neely referred to Meeks by that nickname during his conversation in the courthouse holding cell. Neely's statement to Deputy Gonzales can be considered cumulative of other evidence.

No Prosecutorial Misconduct

Meeks contends that the prosecutor committed misconduct by attempting to elicit testimony from Deputy Gonzales that victim Johnny King was the great grandson

of the famous musician B.B. King. He argues that the prosecutor was appealing to the passion, prejudice and sympathy of the jury for the victim. We disagree.

Prosecutorial misconduct involves the use of deceptive or reprehensible methods to persuade the court or jury, which results in the denial of a fair trial. (*People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 390-391.) A prosecutor commits misconduct when he or she intentionally elicits inadmissible testimony (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380), or appeals to the jury's sympathy for the victim. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318.)

Contrary to respondent's argument, this claim was not forfeited. When the prosecutor asked Deputy Gonzales whether Johnny King was the great grandson of B.B. King, Meeks objected and the objection was sustained. After the jury left the courtroom for a recess, Meeks moved for a mistrial arguing that the prosecutor was playing to the sympathies of the jury. The objection combined with the request for mistrial preserved the issue for appeal. (See *People v. Young* (2005) 34 Cal.4th 1149, 1186.)

The question asked by the prosecution, however, does not rise to the level of prosecutorial misconduct. There is no reasonable likelihood that the jury's knowledge of Johnny King's relationship with B.B. King would have had a significant impact on the jury's sympathy for Johnny King as a murder victim.

Also, any effect of the question was dispelled by trial court instructions on reasonable doubt, and the requirement that the jury must follow the law as given by the court. It is presumed that the jury followed these instructions. (*People v. Frank* (1990) 51 Cal.3d 718, 728; *People v. Bryden* (1998) 63 Cal.App.4th 159, 184.)

Substantial Evidence Supports Attempted Robbery of King

Meeks contends there is insufficient evidence to support his conviction for the attempted robbery of Johnny King because King did not have actual or constructive possession of the property in the store. Meeks argues that King was not an employee of Awoleye, did not have physical custody over any store property, and did not have any special relationship with Awoleye or the store. We disagree.

In evaluating a claim of insufficient evidence, we review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) All conflicts in the evidence are resolved in favor of the judgment and all reasonable inferences are drawn in its favor. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Reversal is required only when there is no substantial evidence to support the conviction under any hypothesis. (*Ibid.*)

Robbery requires "the felonious taking of personal property in the possession of another . . . ." (§ 211.) Possession may be either actual or constructive. (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.) For purposes of robbery, employees of a store not in actual possession are considered to have constructive possession of store property. Previously, some appellate courts held that employees have constructive possession based solely on the employment relationship while other courts limited constructive possession to employees whose duties gave them express or implied authority over the property. (*People v. Jones* (2000) 82 Cal.App.4th 485, 491.) During the briefing in this case, however, our Supreme Court held that all employees constructively possess store property even those whose duties do not involve authority over the property. (*People v. Scott* (2009) 45 Cal.4th 743, 752.)

Meeks claims King was not an employee of any sort and was in the store at the time of the robbery as a friend of Awoleye. (See *People v. Nguyen, supra*, 24 Cal.4th at pp. 763, 765 [visitor not in constructive possession of store property].) We disagree. King's presence in the store performing services for the store, coupled with his relationship to the store owner, provided substantial evidence that he constructively possessed the store's property for purposes of the robbery statute.

King was not an "official" or "formal" employee, did not have regular hours, and was not paid on an hourly or weekly basis. But, King worked in the store and his services benefited the store's business. King came to the store almost every day during the two-month period preceding his murder and had a special relationship to Awoleye similar to that of an apprentice. (See *People v. Scott, supra*, 45 Cal.4th at pp.

753-754; *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 520-521.) In particular, King had responsibility to assist customers buying ringtones and received payment from the sale of ringtones as compensation.

Sentencing Error

Meeks admitted a section 12022.53, subdivision (b) firearm enhancement in return for dismissal of the section 186.22 gang enhancement and section 667.5 prior conviction enhancement. At sentencing, however, the trial court mistakenly imposed the 10-year gang enhancement and one-year prior conviction enhancements, but not the gun use enhancement. Accordingly, the abstract of judgment should be amended to add a 10-year gun use enhancement and strike the 10-year gang and one-year prior conviction enhancements.

DISPOSITION

We direct the trial court to modify the abstract of judgment to reflect imposition of a 10-year section 12022.53, subdivision (b) gun use enhancement and to delete the 10-year section 186.22 gang enhancement and the one-year section 667.5 enhancement. A copy of the amended abstract of judgment is to be forwarded to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Gary R. Hahn, Judge

Superior Court County of Los Angeles

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